



POLICE DEPARTMENT CITY OF NEW YORK

November 22, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Lyndon Providence
Tax Registry No. 927377
Transit Bureau District 30
Disciplinary Case No. 2015-14310

Charges and Specifications:

1. Police Officer Lyndon Providence, on or about February 27, 2015, at approximately 1730 hours, while assigned to Transit District 30 and on duty, in the vicinity of Hoyt/Schermerhorn A/C/G subway station, wrongfully used force, in that he used a chokehold against ROMEO NICHOLSON without police necessity.
P.G. 203-11 - USE OF FORCE
2. Police Officer Lyndon Providence, on or about February 27, 2015, at approximately 1730 hours, while assigned to Transit District 30 and on duty, in the vicinity of Hoyt/Schermerhorn A/C/G subway station, wrongfully used force, in that he restricted or hindered the breathing of ROMEO NICHOLSON without police necessity.
P.G. 203-11 - USE OF FORCE
3. Police Officer Lyndon Providence, on or about February 27, 2015, at approximately 1730 hours, while assigned to Transit District 30 and on duty, in the vicinity of Hoyt/Schermerhorn A/C/G subway station, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he damaged ROMEO NICHOLSON'S property, to wit: a grey sweater used to mop up urine, without police necessity.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT-PROHIBITED
CONDUCT

Appearances:

For CCRB-APU: Suzanne O'Hare, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street-Suite 640
New York, NY 10038

Hearing Dates:
August 30 and 31, 2016

Decision:
Guilty

Trial Commissioner:
ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on August 30 and August 31, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Romeo Nicholson and Alexander Thame as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

At issue in this case is whether Respondent: (1) used a chokehold; (2) restricted or hindered Nicholson's breathing; and (3) damaged Romeo Nicholson's property without police necessity. The testimony at trial established that the following facts were not in dispute. On February 27, 2015, at approximately 1730 hours inside the A/C/G station at Hoyt/Schermerhorn, Romeo Nicholson was taken into custody. Respondent was one of several police officers assigned to Transit District 30, located at the aforementioned station, who participated in

Nicholson's arrest. Nicholson offered resistance to being handcuffed and a struggle ensued, which resulted in Nicholson being brought to the ground by at least three police officers who eventually handcuffed him. During the struggle to handcuff Nicholson, a police officer deployed OC spray ("pepper spray").

Once Nicholson was inside the Transit District 30 office, Respondent offered him medical assistance, which he declined, and attempted to rinse any residual capsicum from his skin. Nicholson was placed in a cell and was eventually transported to Criminal Court for arraignment. While Nicholson was in the holding cell at Transit District 30, he urinated on the floor. Respondent admitted in his sworn testimony that he used a sweatshirt which belonged to Nicholson to mop the urine from the floor.

Romeo Nicholson testified that on February 27, 2015, at approximately 1730 hours, he was present at the Hoyt/Schermerhorn Station, with his two friends, Alex and Person A (T. 24-25).

According to Nicholson, they were on their way to meeting their friend Person B in order to perform in the subway system (T. 25). Nicholson's group eventually saw Person B near a grocery store on the upper level of the station near a stairway (T. 26). After making a purchase at the store, Nicholson and his group attempted to proceed down the stairway to the subway platform but were prevented from doing so by a police officer Nicholson recognized from an encounter the previous day¹ (T. 27). —

¹ Nicholson testified that on October 26, 2015, he and his group were about to enter a subway car in order to perform when their friend Person C was stopped by plainclothes police officers and prevented from embarking on the train. The train pulled away from the station, with Nicholson on board, and he saw Person C handcuffed in the custody of police. Nicholson and his group travelled to the next stop, then crossed the platform to return to the station where Person C had been arrested. When they returned to the station, they encountered two police officers and questioned them regarding Person C's whereabouts. The officers did not provide any information and Nicholson stated that he made a comment that the officers only "act tough because of their badge." Counsel for Respondent objected to any testimony regarding the events of October 26th on the ground of relevance. Counsel for CCRB made an offer of proof that the evidence of the encounter on October 26th would be relevant to proving the motivation for the police actions taken on October 27th. After considering the evidence in the context of the entire record, I find that while evidence of the October 26th encounter might tend to prove why Lieutenant Catusco

An officer Nicholson identified as "the Lieutenant" approached him and said, "Oh, remember yesterday? You want to punch me in my face? What happened to all that stuff you were saying yesterday?" (T. 28). Nicholson replied that he was not speaking to that officer but to his partner. Nicholson attempted to walk away but the officer grabbed his book-bag by the handle (T. 28-29). Nicholson then asked the officer what he was being stopped for and was told that he was "blocking travel" (T. 29). Nicholson protested that he couldn't have been blocking traffic since he just emerged from the grocery store (*Id.*). The officer turned to other police officers behind him, apparently asking them for a confirmation that Nicholson was blocking traffic, which they did verbally (*Id.*). The officer then asked Nicholson for identification and directed the police officers to "lock him up" (*Id.*).

As several officers began moving toward Nicholson, he tried to pull his bag from the grasp of "the Lieutenant" (T. 29-30). As Nicholson did so, he lost his balance and fell to the ground, with the officers getting on top of him (T. 30). Nicholson was struck in the back of his head and he attempted to push upward off the ground (*Id.*). At that point, an unidentified police officer deployed OC spray (*Id.*). Nicholson felt burning in his eyes, nose and mouth (T. 32). After he was sprayed, Nicholson was handcuffed and then picked up by Respondent (T. 33). Respondent placed one arm around Nicholson's neck and held his arm with the other hand (T. 33-34). Nicholson demonstrated for the tribunal a gesture in which he placed his right arm around his own neck so that it touched both sides of his neck but not his throat (T. 34). Nicholson described the effect of Respondent's arm around his neck as "... adding more

focused his attention on Nicholson on October 27th, in the absence of any other evidence that Nicholson was engaged in behavior which would have justified police scrutiny, the evidence was not probative to the issues of whether Respondent used a chokehold, interfered with Nicholson's breathing or damaged Nicholson's property. The evidence tended to corroborate, to some degree, Nicholson's testimony that he recognized the first officer who approached him from the February 26th incident. Accordingly, the evidence was only considered with respect to Nicholson's and Thame's respective credibility.

pressure. It was adding more pressure to my breathing with me being maced" (*Id.*). Nicholson testified that Respondent's arm made contact with the side and front of his neck (T. 35-36). At the time of the alleged incident, he was approximately 5'10" tall and weighed 140-150 pounds (T. 78).

Prior to Respondent placing his arm around Nicholson's neck, his throat hurt from the pepper spray and he "couldn't breathe" (T. 37). Once Respondent placed his arm around Nicholson's neck, Nicholson felt pressure on the "top of his neck" until he reached the door to the precinct (*Id.*, 104). Nicholson estimated the distance he traveled in this manner to be approximately 25 feet (T. 85). Nicholson experienced difficulty in walking because his pants were falling down (T. 105).

Once Nicholson was brought into the precinct, he was placed on a bench but continued to protest the use of OC spray against him and tried to stand up. According to Nicholson, Respondent told him to "stop being a bitch" and placed his knee on Nicholson's privates (T. 52-53). When Nicholson asked to rinse his eyes, Respondent took him to a rest room and rinsed his head with water (T. 53-54). Nicholson was then placed in a cell while handcuffed behind his back. Nicholson asked to use the bathroom several times but was told to wait (T. 55-56). While in the cell, Nicholson was able to step through his arms and bring them to his front side while handcuffed (T. 95-96). Nicholson eventually urinated on the floor of the holding cell, after which Respondent mopped the urine up with one of Nicholson's sweaters. As Respondent walked out of the cell, another officer told him, "Watch out for him, he's sneaky," referring to Nicholson. Respondent turned to him and said "I'm not like the other cops, I aim at the nose" (T. 57). After Respondent turned his back, Nicholson spat at him but hit another police officer (T. 58). The individual Nicholson described as "the Lieutenant" responded, "You want to spit on

my officers? We're going to mace him again" (T. 58). The officers then handcuffed Nicholson to a pole bolted to the wall behind the bench upon which he sat (T. 59).

Nicholson conceded on cross-examination that he had received several notices of trial dates for this case but he had them adjourned during the pendency of his criminal case (T. 72). Nicholson believed up to six police officers were on top of him as he lay on the ground and could not breathe (T. 80). Nicholson further admitted that in his statement to CCRB, he asserted that a police officer had threatened to punch him in the face while he was handcuffed (T. 97-98). Nicholson did not seek medical attention for any injury allegedly incurred as a result of his arrest, either while he was at Central Booking or at any time after being released (T. 102).

Alexander Thame testified that he was present on the "A" train with Nicholson and Person C on February 26th when Person C was detained by police officers (T. 111). Thame was also present when Nicholson had a conversation with two police officers at the same station in an attempt to locate Person C, as well as traveling with Nicholson to the Transit District 30 office to inquire further about Person C's whereabouts (T. 113-114). Finally, Thame heard Nicholson make the comment that the police officers were being uncooperative only because they had badges (T. 113).

On February 27, 2015, at about 1730 hours, Thame accompanied Nicholson and another friend named Person A to the Hoyt/Schermerhorn station in the hopes of meeting Person B (T.

114-115). The group proceeded to a newsstand on the upper level of the station, where Nicholson made a purchase (T. 115-116). As the group walked toward a stairway leading to the subway platform, one of the police officers whom Thame had seen the day before stopped Nicholson, saying, "You remember me, you said you were going to punch me in my face" (T. 116). This officer was approximately 5' 11" tall with gray hair (T. 116-117). Thame

observed the officer

grab Nicholson's wrist; Nicholson attempted to move away from the officer and several other police officers converged upon him (T. 117-118). Four to five police officers tackled Nicholson to the ground and placed handcuffs on him (T. 118). Nicholson was "begging for his life" and shouting that he "couldn't breathe" (T. 118). After Nicholson was placed in handcuffs, Thame observed a police officer remove a pepper spray canister and later saw the evidence of pepper spray mist in the area (T. 119). Nicholson was on the ground for about two minutes before a tall, dark skinned police officer, identified as Respondent, "grabbed him, had him in a chokehold, and just picked him up from his arm and then escorted him to the precinct" (T. 121). Thame described the distance Nicholson and the tall officer walked as approximately "five or six feet" (T. 127). According to Thame, Respondent had his arm around Nicholson's neck for about two minutes (*Id.*).

CCRB Exhibit I was admitted into evidence over Respondent's objection. The exhibit is a 36 second video taken by Person B, one of Nicholson's associates. The video begins with a depiction of 3 to 4 police officers on the ground holding Nicholson. Nicholson's voice can be heard screaming, "My eyes!" Another voice is heard saying, "Yo, Romeo, don't resist, bro! . . . Romeo, just chill!" At approximately 0:21 seconds, the police officers stand up and lift a handcuffed Nicholson, who is face down, to his feet. At approximately 0:25 seconds, Nicholson is brought to his feet and Respondent, dressed in a dark hooded sweatshirt and dark pants, places his left arm around Nicholson's neck and begins walking behind him. Nicholson's pants appear to be falling and restricting his movement. At 0:28 seconds, the camera cuts away from Nicholson and pans right, then picks up Nicholson again at 0:33 seconds, where he is at the door to the precinct. Respondent's arm is still around his neck at this point. Respondent can be seen reaching out for the door to the precinct with his right hand and pulling the door open.

Respondent testified that he is an Anti-Crime officer assigned to Transit District 30 and has been so assigned for four years. Respondent was appointed to this Department in 2000 (T. 143-144). On February 27, 2015, at approximately 1730 hours, Respondent was inside Transit District 30 at Hoyt/Schermerhorn when he was approached by Lieutenant Catusco, who asked him if he would accompany him to "get some kids to move along" (T. 146, 147). When Respondent left the office and stepped onto the upper level of the station, he saw five or six youths standing at the top of the stairway leading to the southbound "A," "C" and "G" trains (T. 148).

Lieutenant Catusco approached the group and appeared to have a 20 to 25 second conversation with them (T. 149). After that discussion, the group, with the exception of Nicholson, proceeded down the stairway to the subway platform (T. 149). As they descended the stairs, they continued to watch Nicholson's encounter with Lieutenant Catusco (*Id.*). After a short time, Lieutenant Catusco placed his hand on Nicholson and demanded that he produce identification (*Id.*). Nicholson became loud, saying "I don't have to give you ID, I don't have to move" (T. 149-150). Respondent observed Nicholson pull himself from Lieutenant Catusco's grasp and attempt to run away (T. 150). Lieutenant Catusco pursued Nicholson for a short distance but eventually caught him (T. 152). According to Respondent, Police Officer Marksberry assisted Lieutenant Catusco and both brought Nicholson down to the ground, where five to six officers in total tried to restrain him (*Id.*). Respondent observed Nicholson struggling to avoid being handcuffed, including flailing his arms and legs and biting Lieutenant Catusco's hands (*Id.*). Respondent was aware that someone apparently deployed OC spray but he did not (*Id.*). Once he was sprayed, Nicholson began yelling, "I'm burning, I'm burning" (T. 153). It took about 30 seconds to bring Nicholson under control and handcuff him (T. 154).

Once Nicholson was handcuffed, Respondent "called a halt to the situation" and picked him up from the ground by his arm (T. 155). Nicholson was still fighting and Respondent had to escort him into Transit District 30, which was approximately 40 feet away (*Id.*). Respondent described the manner in which he held Nicholson as his left arm being across Nicholson's shoulders and his right hand on the handcuffs (T. 156). Respondent used his hips and shoulders to guide Nicholson as he held him in this manner (T. 157-158). Respondent denied ever placing his arm around Nicholson's neck in a "V" shape to lift him from the ground or ever compressing either side of his neck with his arm (T. 158). Respondent admitted hearing Nicholson complain about not being able to breathe but that he did so while he was on the ground being handcuffed (T. 159). Furthermore, Respondent attributed Nicholson's protestations that he "couldn't breathe" to be related to the previous use of OC spray, rather than a compression of his airway by Respondent's arm (*Id.*). Respondent further denied opening the door to the Transit District (T. 160). Respondent was 6'5" tall and weighed approximately 230 pounds at the time of the incident (T. 166).

Respondent admitted on cross-examination that he was made aware by Lieutenant Catusco that Nicholson was a member of a group he had seen dancing on subway trains in the past, although he claimed he was made aware of that assertion after assisting in Nicholson's arrest (T. 175-176). While Respondent asserted that his arm was placed across Nicholson's shoulders, he could not be sure that his arm did not shift and go higher on Nicholson's torso in the 40 to 50 foot distance he traveled with him to the door of Transit District 30 (T. 180-181).

Under questioning by the Tribunal, Respondent stated that his understanding of the meaning of "chokehold" was restricting an individual's breathing by placing an arm around his throat (T. 189). Respondent asserted that he held Nicholson with an arm around his upper body,

and one holding his handcuffs, because Nicholson was unable to see and had to be led into Transit District 30 (T. 189-190).

I. Use of a Chokehold

The Patrol Guide is controlling in this case. Section 203-11 imposes the standards to be followed when the use of force is necessary to achieve legitimate police goals. It specifically requires that members of service "at the scene of an incident" use the "minimum force" needed and that they "employ non-lethal alternatives, as appropriate." "Deadly physical force" may only be used "as a last resort and consistent with Department policy and the law." Section 203-11 warns uniformed members of service that "excessive force will not be tolerated."

It is within this context that the Patrol Guide proscribes the use of chokeholds by officers as they carry out their duties. Section 203-11² states in pertinent part:

Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.

In sum, although the use of deadly force is permitted, when necessary, the Patrol Guide in effect at that time rules out chokeholds as a sanctioned option. Moreover, as written, what constitutes a chokehold under the Patrol Guide is broadly defined and *mens rea* is not a delineated factor.

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account. *Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 (1st Dep't 1994).

² While the provisions of Section 203-11 have been revised and incorporated into the Force Guidelines now set forth in Section 221-01, the definition of chokehold remains unchanged.

I credit Nicholson's testimony with respect to the sequence of events on February 27th as they pertain to the allegations of misconduct against Respondent. Although the Tribunal has concerns with Nicholson's credibility in other respects, his factual assertions of the manner of his arrest are corroborated by the testimony of other witnesses and the video recording in evidence.

Nicholson testified that Respondent placed an arm around his neck. Thame's testimony and the video recording confirm this fact. The video shows Respondent's arm around Nicholson's neck for approximately five seconds in a position which corroborates the credible testimony that Nicholson felt pressure on his neck.³ This type of hold falls squarely within the definition of a chokehold, as "any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air."⁴ Respondent admitted placing his left arm around Nicholson's upper body, but not directly against his neck, conceding apparently that he could not rule out the possibility of his arm shifting to a point where it might have come in contact with Nicholson's neck.

Accordingly, I find him Guilty of Specification 1.

³ Nicholson's testimony was further corroborated by Thame's description of Respondent placing his arm around Nicholson's neck.

⁴ There were no exceptional circumstances present in this case as the Police Commissioner found in Case No. 2014-11368 (Jul. 25, 2016).

2. *Restriction of Breathing*

I find that, based upon the relevant, credible evidence in the record, CCRB has met its burden of proving that Respondent restricted or hindered Nicholson's breathing. Nicholson described the effect of being subjected to OC spray as "I couldn't breathe" (T. 32). In order to distinguish that effect from any other physical impact from which the tribunal may infer that Respondent's arm hold interfered with Nicholson's breathing, Nicholson would have had to testify to either a new feeling or the aggravation of a pre-existing feeling.

When asked to describe the pressure around his neck, Nicholson testified, "It was adding more pressure. It was adding more pressure to my breathing with me being Maced" (T. 34). Nicholson was asked more pointedly how his neck felt when Respondent put his arm around his throat and gave the following response:

Q. Can you describe the pressure on your neck?

A. It was hurting. I don't know how. I don't know.

Q. Was it soft?

A. No.

(T. 36). Nicholson affirmed his earlier assertion that he "couldn't breathe" before Respondent placed his arm around his neck but when asked whether there was a difference after Respondent employed the chokehold, he testified, "I still couldn't breathe" (T. 37). Nicholson was questioned again whether the feeling was different after the chokehold and he gave the following answers:

Q. Was it different?

A. Yes.

Q. How was it different?

A. There was pressure on top of my neck.

(T. 38).

Based upon the foregoing, I find that the record establishes that Respondent's chokehold interfered with Nicholson's breathing. Accordingly, I find Respondent Guilty of Specification 2.

3. *Damage to Property*

Based upon Nicholson's un rebutted testimony, as well as Respondent's admission under oath that he mopped up Nicholson's urine from the floor of the holding cell with his sweatshirt, I find Respondent Guilty of Specification 3.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on September 29, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested that Respondent forfeit 45 vacation days. Respondents in previous cases have suffered penalties of 15 vacation days for the use of a chokehold (*Case No. 2015-13121* [Sep. 20, 2016][Ten-year police officer with no prior disciplinary history forfeits 15 vacation days for wrongfully using force by placing his forearm around an individual's throat, thereby causing him to be held in a chokehold for 16 seconds]; *Case No. 2014-12925* [Feb. 16, 2016][21-year police officer with two prior disciplinary adjudications forfeits 15 vacation days for using a chokehold. The record established that Respondent grabbed the individual's throat with one hand and maneuvered his body away from a fence]).

Respondents in previous cases have forfeited from 10 to 30 vacation days for destruction of property (*Case No. 2015-13135* [Jun. 9, 2016][Eleven-year detective with no prior formal

disciplinary history negotiated a penalty of 30 suspension days already served for, while off-duty, setting his wife's personal property on fire. During the course of divorce proceedings, and while still living together, Respondent removed a number of pairs of his wife's underwear from her dresser drawer and burned them in a garbage can outside of their house)).

In this case, Respondent used a prohibited maneuver against a handcuffed suspect over which he enjoyed a decided height and weight advantage. In addition, Respondent was aware that Nicholson had been subjected to OC spray and was complaining of an inability to breathe. Although this specification charges Respondent with using a chokehold without police necessity, there were no necessity or exigent circumstances exception set forth in the Patrol Guide at the time.

Based upon the undisputed facts that: (1) Nicholson was unable to see at the time Respondent picked him up from the ground; (2) Nicholson was handcuffed; (3) Respondent had a distinct height and weight advantage over Nicholson; and (4) there were at least three other police officers standing in close proximity to Respondent who could have offered aid, there was neither a need to restrict Nicholson's movements by placing an arm around his body in the area of his neck nor any exigent circumstances which would have mitigated the use of this prohibited maneuver.

Respondent's act of mopping Nicholson's urine with his sweatshirt was mean-spirited and vindictive. While Respondent may have been justifiably annoyed with the crude behavior of a teenager, he was, and is, a New York City Police Officer in whom this Department and the public repose great trust. He is held to a higher standard of behavior than a member of the general public and should have exercised forbearance rather than responding to Nicholson in such a contemptible manner.

I do find Respondent's candid admission of guilt to the conduct set forth in Specification 3 mitigating.

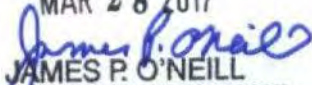
Based upon the foregoing, I recommend that Respondent forfeit 25 vacation days.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Paul M. Gamble', with a large, stylized initial 'P'.

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

MAR 28 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER LYNDON PROVIDENCE
TAX REGISTRY NO. 927377
DISCIPLINARY CASE NO. 2015-14310

On his last three annual performance evaluations, Respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent." He has been awarded two medals for Excellent Police Duty and two medals for Meritorious Police Duty. [REDACTED]

In 2011, Respondent forfeited 20 vacation days after being found guilty of failing to safeguard his firearm. He has no other formal disciplinary history.

Paul M. Gamble
Assistant Deputy Commissioner Trials